Office-Supreme Court, U.S.
FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

In the Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION, PETITIONER

v.

JULIUS MULLINS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

BARBARA E. ETKIND
Assistant to the Solicitor General

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

T. TIMOTHY RYAN, JR.
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 bars Kaiser from raising as defenses to this collection suit by trustees of employee benefit plans the alleged illegality under the antitrust laws, 15 U.S.C. 1 and 2, and Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), of the provision of the collective bargaining agreement that requires Kaiser to make contributions to the plan.

2. Whether Section 306(b) of the 1980 Amendments requires affirmance of the award of attorneys' fees to the trustees.

TABLE OF CONTENTS

	Page
Statutes involved	1
Statement	1
Summary of argument	10
Argument:	
I. Applicable law precludes Kaiser from raising the defense of illegality under the antitrust laws or Section 8(e) of the NLRA in this action by trustees of pension and welfare funds	13
A. Section 306(a) of the 1980 Amendments precludes the raising of Kaiser's illegality defenses	15
1. Section 306(a) makes an employer liable for all prescribed contributions except those the very making of which would itself be unlawful	15
a. The statutory language	15
b. The legislative history	16
2. The making of the payments required by the purchase-of-coal clause is not, in and of itself, unlawful	29
B. Section 306(a) of the 1980 Amendments is applicable to this case	31
1. Nature and identity of the parties	32
2. The nature of the rights affected	33
3. Nature of the impact of the change in law	34
II. Under applicable law, the trustees are entitled to attorneys' fees	36
Conclusion	37
Appendix A	1a

TABLE OF AUTHORITIES

Cases: Page

Bishop v. *Wood*, 426 U.S. 341 6
Bradley v. *Richmond School Board*, 416 U.S. 696.... 11, 12, 31, 32, 33, 34, 35, 37
Bruce's Juices, Inc. v. *American Can Co.*, 330 U.S. 743 14
Connell Construction Co. v. *Plumbers Local No. 100*, 421 U.S. 616 35
Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540..... 14
Consolidated Express, Inc. v. *New York Shipping Association*, 602 F.2d 494, vacated and remanded on other grounds, 448 U.S. 902 35
Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U.S. 227 14
Contractors, Etc. v. *Associated Wrecking Co.*, 638 F.2d 1128 29
Cort v. *Ash*, 422 U.S. 66 31
Ewell v. *Daggs*, 108 U.S. 143 34
Gross v. *United States Mortgage Co.*, 108 U.S. 477.. 34
Home Building & Loan Association v. *Blaisdell*, 290 U.S. 398 34
Huge v. *Long's Hauling Co.*, 590 F.2d 457, cert. denied, 442 U.S. 918 .....14, 20, 24, 25, 26, 27, 28, 29, 33
Huge v. *Old Home Manor, Inc.*, 419 F. Supp. 1019.. 17, 18
Hutto v. *Finney*, 437 U.S. 678 31
Kelly v. *Kosuga*, 358 U.S. 516.....6, 7, 9, 12, 13, 14, 34
Lewis v. *Benedict Coal Corp.*, 361 U.S. 459..8, 14, 25, 28, 33
Lewis v. *Mill Ridge Coals, Inc.*, 298 F.2d 552.....26, 28, 33
Lewis v. *Seanor Coal Co.*, 382 F.2d 437, cert. denied, 390 U.S. 947 17
McMullen v. *Hoffman*, 174 U.S. 639 .....12, 14, 34
McNair v. *Knott*, 302 U.S. 369 34
National Stabilization Agreement of the Sheet Metal Industry Trust Fund v. *Commercial Roofing & Sheet Metal*, Nos. 78-1761, 78-2071 (D.C. Cir. May 4, 1981) 24
Nedd v. *United Mine Workers*, 556 F.2d 190, cert. denied, 434 U.S. 1013 17
Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 35

Cases—Continued

	Page
Riverton Coal Co. v. *UMWA*, 453 F.2d 1035, cert. denied, 407 U.S. 915	35
Small Co. v. *American Sugar Refining Co.*, 267 U.S. 223	14
Thorpe v. *Housing Authority of Durham*, 393 U.S. 268	31, 32
United Mine Workers of America (Dixie Mining Co.), 188 N.L.R.B. 753, appeals dismissed on other grounds, 468 F.2d 1139	35
United States v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103	12, 31, 32, 33
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1	34
Waggoner v. *McGray*, 607 F.2d 1229	20
Walsh v. *Schlecht*, 429 U.S. 401	30, 31
Washington Area Carpenters' Welfare Fund v. *Overhead Door Co.*, 488 F. Supp. 816	20, 28
West Side Belt R.R. v. *Pittsburgh Construction Co.*, 219 U.S. 92	34
Western Washington Cement Masons Health & Security Trust Funds v. *Hillis Homes, Inc.*, 107 L.R.R.M. 2897	29
Western Washington Laborers-Employers Trust Fund v. *McDowell*, 103 L.R.R.M. 2219 (W.D. Wash. 1979)	20, 28
Wilder Mfg. Co. v. *Corn Products Co.*, 236 U.S. 165	14

Statutes:

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*	1, 16, 33, 36
Section 203, 29 U.S.C. 1053	17
Sections 301-306, 29 U.S.C. 1081-1086	16
Section 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B)	16
Section 406(a)(1)(B), 29 U.S.C. 1106(a)(1)(B)	16
Section 502, 29 U.S.C. 1132	3, 9, 18
Section 502(a)(3), 29 U.S.C. 1132(a)(3)	9
Section 502(g), 29 U.S.C. 1132(g)	9

Statutes—Continued **Page**

Labor-Management Relations Act of 1947, 29 U.S.C. 141 *et seq.*:
Section 301, 29 U.S.C. 185 ..... 3, 9
Section 302, 29 U.S.C. (& Supp. III) 186 ..... 11, 16, 23, 24, 30
Section 302(c)(5), 29 U.S.C. 186(c)(5) ..24, 30, 31
Section 302(c)(5)(B), 29 U.S.C. (Supp. III) 186(c)(5)(B) 17
Section 303, 29 U.S.C. 187 35
Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 *et seq.* 9
Section 108(c)(1), 94 Stat. 1267 ..... 10, 32, 2a
Section 306, 94 Stat. 1295 ..... 10, 20, 31, 32
Section 306(a), 94 Stat. 1295 ..... *passim*, 1a
Section 306(b), 94 Stat. 1295 .... 10, 13, 19, 36, 1a-2a
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
Section 8, 29 U.S.C. 158 7
Section 8(b)(4), 29 U.S.C. 158(b)(4) 8
Section 8(e), 29 U.S.C. 158(e) ..... *passim*
Section 8(f), 29 U.S.C. 158(f) 28
Sherman Act, 15 U.S.C. 1 *et seq.*:
Section 1, 15 U.S.C. 1 3
Section 2, 15 U.S.C. 2 3

Miscellaneous:

126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) ..21, 24, 36
126 Cong. Rec. S10102 (daily ed. July 29, 1980) .. 22
126 Cong. Rec. S11673 (daily ed. Aug. 26, 1980) .. 22, 24-25, 36
Department of Labor Advisory Opinion 78-28A (Dec. 5, 1978), *reprinted in* Pens. L. Rep. (BNA) No. 221 at R-25 (Jan. 8, 1979) 17
ERISA Improvements Act of 1978: Joint Hearings on S. 3017 Before the Subcomm. on Labor of the Senate Comm. on Human Resources and the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance, 95th Cong., 2d Sess. (1978) 19

Miscellaneous—Continued Page

ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. (1979).. 19
H.R. 3904, 96th Cong., 1st Sess. (1979) 20, 21
H.R. Rep. No. 93-533, 93d Cong., 1st Sess. (1973).. 16
Multiemployer Pension Plan Amendments Act of 1979: Hearings on S. 1076 Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. (1979) 18
Multiemployer Pension Plan Termination Insurance Program: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. (1979) 18
Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 18, 19
Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740 (1976) 17, 18
S. 3017, 95th Cong., 2d Sess. (1978) 19
S. 209, 96th Cong., 1st Sess. (1979) 19
S. 1076, 96th Cong., 1st Sess. (1979) 20
Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration* (Comm. Print 1980) 20, 21, 2a-3a
The Multiemployer Pension Plan Amendments Act of 1979: Hearing on H.R. 3904 Before the House Comm. on Ways and Means, 96th Cong., 2d Sess. (1980) 18
The Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 96th Cong., 1st Sess. (1979) 18-19

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1345

KAISER STEEL CORPORATION, PETITIONER

v.

JULIUS MULLINS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order of May 4, 1981, inviting the Solicitor General to express the views of the United States (A. 81).*

STATUTES INVOLVED

In addition to the statutes cited in the petition and in petitioner's brief (Pet. 2, Br. 2, Pet. App. 85a-88a), recent amendments to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, which also are relevant, are set forth in Appendix A, *infra*.

STATEMENT

1. Petitioner is a member of the Bituminous Coal Operators Association (BCOA), a multiemployer bargaining association of coal producers. In 1974, the BCOA, together with other coal operator associations and various

* "A." references are to the joint appendix filed in this Court. "J.A." references are to the joint appendix filed in the court of appeals.

individual coal operators, entered into a collective bargaining agreement with the United Mine Workers of America for the period December 6, 1974, to December 6, 1977, known as the National Bituminous Coal Wage Agreement of 1974 (A. 70).

In Article XX of the 1974 Agreement, the signatory employers agreed to contribute to four employee health and retirement trust funds.[1] Section (d)(1) of Article XX required each signatory employer to pay to the trust funds a specified amount for each ton of coal it produced, for each hour worked by covered employees, and for each ton of coal "procured or acquired by such [e]mployer for use or for sale on which contributions to the appropriate [T]rusts as provided for in this Article have not been made * * *" (A. 31, 70-71) (the purchase-of-coal clause).[2] Section (d) of Article XX also provided that if the purchase-of-coal clause were found invalid by any court or agency the Union could demand negotiations "upon a clause to be inserted into this Agreement in replacement of the provision found invalid or unlawful" (A. 32), and Article XXIX, Section (b), permitted termination of the Agreement in such circumstances (J.A. 56). Finally, Article XX, Section (d)(5), required employers to furnish the fund trustees with monthly statements showing "the full amounts due hereunder and the tons of coal produced, procured or acquired for use or for sale and the hours worked with respect to which the amounts are payable" (A. 35).

---

[1] The four separate trust funds—the 1950 Pension Trust, the 1950 Benefit Plan and Trust, the 1974 Pension Trust and the 1974 Benefit Plan and Trust (A. 28-29)—are held by the same set of three trustees. Contributions to all four trust funds are involved in this litigation.

[2] Section (d)(1) explained that the tonnage requirements of the purchase-of-coal clause were the same as the tonnage plus man-hour payments required for produced coal because, for the purpose of the purchase-of-coal clause, the hourly contributions had been converted to their tonnage equivalents (A. 31; see also J.A. 463-464).

2. Respondents, the trustees of the funds, filed this action on April 11, 1978. They asserted jurisdiction under both Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185, and Section 502 of ERISA, 29 U.S.C. 1132 (A. 11), and alleged that Kaiser had failed to make all contributions due the funds under the 1974 Agreement and that it also had failed to report purchases of coal on which it had not made contributions to the funds (A. 13). The trustees sought an order requiring Kaiser to file reports on coal purchased by it during the period of the 1974 Agreement and to pay the amounts due thereon plus attorneys' fees (A. 13-14).

In its answer, Kaiser admitted that it had purchased coal and had not reported the purchases (A. 58-59). It asserted as affirmative defenses that "[t]he provisions of the 1974 Agreement on which plaintiffs rely are, and were at their inception, void and unenforceable" as violative of Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), and Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2 (A. 59).

On cross-motions for summary judgment, submitted on written affidavits, Kaiser presented the following evidence: Kaiser is a steel manufacturer that produces and purchases coal for use in its steel manufacturing operations (J.A. 475). Its manufacturing processes require mid-volatile coking coal as well as the high-volatile coal that Kaiser produces from its own mines (J.A. 480). Kaiser purchases the mid-volatile coal it requires from Mid-Continent Coal and Coke Company, which it considers the most economical source available (J.A. 466, 480). Mid-Continent's employees are represented by the Redstone Workers Association, not by the UMW (J.A. 327), and officers of Mid-Continent and Kaiser stated that the wages and benefits received by Mid-Continent's employees were equal or superior to those required by the UMW contract (J.A. 329-333, 480-481). Nonetheless, Kaiser affiants stated, the UMW has long sought to organize Mid-Continent's employees (J.A. 333-334, 476).

Kaiser affiants also stated that Kaiser's purchases of coal from Mid-Continent had been common knowledge in the coal industry for some time (J.A. 334-335, 467), that they were specifically known to certain UMW officials, including former UMW President and fund trustee Anthony Boyle, and that Union officials frequently had asked both Kaiser and the United States Steel Corporation to stop making such purchases (J.A. 467-468, 470-471).

Kaiser affiants further stated that the purchase-of-coal clause was not taken into account in computing the needs and revenues of the UMW trust funds during the negotiation of the 1974 Agreement (J.A. 463-465, 471); nor was any attempt even made to calculate the difference between UMW and non-UMW wages and benefits (J.A. 464, 471). Rather, the affiants traced the origin of the purchase-of-coal clause to prior "no subcontracting" clauses that were contained in UMW contracts from 1941 to 1958 (J.A. 477, 483) and to a protective wage clause that was adopted in 1958, pursuant to which the operators agreed that all coal "procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract" (J.A. 485; accord, J.A. 477). These provisions were omitted in 1964, when the purchase-of-coal clause was first adopted (J.A. 477). According to Kaiser's affiants, the new clause was intended to deter UMW signatories from purchasing coal produced by employers who were not UMW signatories by increasing the total cost of the non-UMW signatories' coal, thereby putting economic pressure on the latter to recognize the UMW as the bargaining representative of their employees (J.A. 334-336, 470-471, 477-478). The steel company members of the BCOA were able to negotiate an exception for themselves from the purchase-of-coal clause until 1971, when, following a strike, they agreed to its inclusion in their agreement with the UMW (J.A. 471-472, 478-479). Kaiser apparently became sub-

ject to the clause when it joined the BCOA in 1974 (J.A. 480).

The trustees submitted affidavits by various individuals intended to show that Kaiser's evidence did not contain sufficient details to prove either that Kaiser needed the particular grade of coal produced by Mid-Continent (J.A. 643-646) or that Mid-Continent's employees received wages and benefits equivalent or superior to those provided by the UMW contract (J.A. 610-618, 640-642). They also denied knowing of Kaiser's purchases from Mid-Continent until near the end of the term of the 1974 Agreement, pointing out that Arnold Miller had replaced Anthony Boyle as president of the UMW by 1973 (J.A. 181-182, 630-631).

The trustees' affiants further asserted that the purchase-of-coal clause served dual purposes, namely, "to preserve the work and work standards of employees of signatories" and "to ensure that [the UMW's] trust funds maintained their ability to provide benefits whether or not signatory employers produced coal themselves or purchased coal from other coal producers," and that it "was not designed as a tool to promote UMWA organizing efforts" (J.A. 571; accord, J.A. 628-629, 636-637). While agreeing that the clause was a substitute for the 1958 protective wage clause and the prior prohibitions on subcontracting, the trustees explained that both the earlier provisions and the current one are justified by the historical practice of signatory employers' contracting out work to non-signatories in order to take advantage of the non-signatories' lower labor costs (J.A. 568-569, 572).[3] They

---

[3] The purchase-of-coal clause itself has evolved over the years. The original clause, which was contained in the 1964 Agreement, required a payment of 80¢ per ton on purchased coal and 40¢ per ton on coal produced by signatories (J.A. 570, 589). In 1971, when the purchase-of-coal clause was amended to provide for increases in contributions on produced coal from 60¢ per ton for the first year of the agreement to 80¢ per ton for the final six months of the agreement, provision also was made for a constant 40¢ per ton

produced evidence of lower average wages, fringe benefits, and mine safety expenditures in non-UMW mines (J.A. 572-575, 629), and stated that payments under the purchase-of-coal clause were intended to approximate the difference between UMW and non-UMW labor costs, although the data necessary to calculate the difference precisely were unavailable (J.A. 575, 638-639). They also stated that contributions to be made under the clause were taken into account in calculating the revenue needs of the funds (J.A. 640). Finally, they stated that in 1974 signatory employers produced approximately 65% of the bituminous coal mined in this country, that the number and production of non-signatories have increased since 1974, that the non-signatories have markets for their coal other than signatory employers (J.A. 575), and that "[t]he purchase-of-coal clause has not forced non-signatory employers to become signatory employers or to go out of business" (J.A. 576).

3. On this record, the district court granted summary judgment for the trustees (Pet. App. 80a). (Accordingly, Kaiser is entitled to have its version of the facts set forth above accepted by this Court; *Bishop* v. *Wood*, 426 U.S. 341, 347 (1976).)[4]

The district court first rejected Kaiser's defense that the purchase-of-coal clause was unenforceable because it violated the antitrust laws. Characterizing "[t]he general rule emerging from *Kelly* [v. *Kosuga*, 358 U.S. 516 (1959), as the notion] that a contract should be enforced

---

premium on purchased coal for the duration of the contract (J.A. 570, 593). Finally, in 1974, when the collective bargaining agreement that is involved in this case was executed, the payments on purchased coal were made equivalent to those on produced coal so that the clause "could not be construed under any circumstances to constitute a 'penalty'" (J.A. 629; see also J.A. 571).

[4] Kaiser, however, does not dispute any of the facts contained in the trustees' "Statement of Material Facts as to Which There is No Genuine Issue" (A. 69-73), which was filed in support of their motion for summary judgment in the district court (see Pet. Br. 2 n.2).

whether or not it fosters illegal ends, unless the alleged illegality is of such a character that enforcement of the contract would 'make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act.'" (Pet. App. 75a, quoting 358 U.S. at 520), the court held that the present case, in which the trustees sought to recover "one component of agreed compensation pursuant to the terms of a contract which has expired," did not come within the narrow exception contemplated by the Court in *Kelly* (Pet. App. 77a).

The district court also rejected Kaiser's contention that the purchase-of-coal provision was "void and unenforceable" as a "hot cargo" provision under Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), on the ground (Pet. App. 77a) that "when an activity is arguably subject to Section 8 of the National Labor Relations Act, federal courts must defer to the exclusive competence of the NLRB."

4. The court of appeals affirmed, with one judge dissenting (Pet. App. 1a-67a). As had the district court, the court of appeals held (Pet. App. 12a):

> The pith of *Kelly* is that the illegality of the ends being sought is not the measuring stick for deciding whether the contract should be enforced; only if the enforcement "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act," can a court refuse to enforce the contract. 358 U.S. at 520.

It characterized (Pet. App. 13a) the payment of royalties on purchased coal as "part of the overall compensation" under a labor contract that already had been fully performed by the employees, as a *quid pro quo* constituting "an intelligible economic transaction in itself," and not a restraint forbidden by the Sherman Act. The court refused to consider the history and alleged ultimate purpose of the clause, holding that "[s]uch an exploration into the purported anticompetitive purpose of a contract clause is precisely what *Kelly* disallows" (*ibid.*).

The court of appeals also invoked considerations of equity and relative fault, holding (Pet. App. 15a-17a) that Kaiser should not be allowed to defend on the basis of the illegality of a contract to which it was a party against claims by the trustees, who were merely representatives of innocent third party beneficiaries. It deemed this principle particularly applicable to the present case, because of "the concern of federal labor policy to protect union members and their families from the actionable wrongs of their union representatives," citing *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960) (Pet. App. 17a). Finally, it characterized (*ibid.*) Kaiser's apparent concealment of its coal purchases as "an effort to confound the collective bargaining process and manipulate the judicial process instead," by depriving the UMW of its right to negotiate a substitute pension contribution clause, by failing to take the initiative in seeking a judicial resolution, and by "using the courts in an effort to circumvent what [it had] freely bargained for * * *" (*id.* at 19a).

Also like the district court, the court of appeals refused to adjudicate the purchase-of-coal clause's legality under Section 8(e) of the NLRA, 29 U.S.C. 158(e), because "the primary enforcement mechanism for section 8(e) violations is through the Labor Board" (Pet. App. 20a) and because "[t]o permit an employer to assert a section 8(e) defense in a suit like this would add the remedy of contract avoidance to the other forms of relief which the statute expressly provides" (Pet. App. 22a). It held that the "unenforcible [*sic*] and void" language of Section 8(e) does not create "an independent remedy available at all times and against all parties," (Pet. App. 22a), but "simply * * * prevent[s] a union from obtaining specific performance of a 'hot cargo' clause" or "compelling through judicial enforcement of collective bargaining agreements the very conduct that the union could not compel by its economic might" (*id.* at 23a) under Section 8(b)(4), 29 U.S.C. 158(b)(4).

Finally, the court held (Pet. App. 34a) that an action for delinquent contributions could be maintained under Section 502 of ERISA, 29 U.S.C. 1132, as well as under Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185, and that the district court's award of attorneys' fees was proper under 29 U.S.C. 1132(g).

Judge Wilkey dissented on the ground (Pet. App. 39a-47a) that in this case, unlike in *Kelly*, *supra*, the contractual provision under which the trustees sought payment was the very one that Kaiser alleged was illegal, and that therefore requiring payment would give effect to an alleged illegal boycott and infringe Kaiser's legally protected interests. He perceived no "windfall" for Kaiser in its nonperformance (Pet. App. 47a-48a), nor, on the undisputed facts, any inequity in denying enforcement (Pet. App. 49a-52a). He also stated his view (Pet. App. 58a-65a) that the courts have jurisdiction to deny enforcement of contracts violating Section 8(e) of the NLRA where the statute is raised as a defense. Finally, Judge Wilkey would have reversed the award of attorneys' fees under Section 502(g) of ERISA, 29 U.S.C. 1132(g), on the ground (Pet. App. 66a-67a) that Section 502(a)(3), 29 U.S.C. 1132(a)(3), authorizes actions by fiduciaries only for a violation either of ERISA itself or of a benefit plan, whereas Kaiser's alleged violation of its collective bargaining contract was neither.

5. Nine days after the court of appeals rendered its decision in this case, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (the "1980 Amendments"), Pub. L. No. 96-364, 94 Stat. 1208 *et seq.* Section 306(a) of the Amendments, 94 Stat. 1295, added a new section to ERISA, which is entitled "Delinquent Contributions" and which provides:

> Sec. 515. Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent

not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.[5]

Section 108(c)(1) of the 1980 Amendments, 94 Stat. 1267, made Section 306 effective "on the date of enactment of [the 1980 Amendments]," *i.e.*, September 26, 1980.

Kaiser filed its petition for a writ of certiorari on February 10, 1981.

SUMMARY OF ARGUMENT

I

A. Congress exhibited its special solicitude for the financial integrity of multiemployer pension and welfare plans by establishing, in the Multiemployer Pension Plan Amendments Act of 1980, a special rule narrowly restricting the availability of illegality defenses to actions for delinquent contributions brought by trustees of multi-

---

[5] Section 306(b), 94 Stat. 1295, added the following to Section 502(g) of ERISA, 29 U.S.C. 1132(g):

> (2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan--
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
>
> (E) such other legal or equitable relief as the court deems appropriate.
>
> For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or if none, the rate prescribed under Section 6621 of the Internal Revenue Code of 1954.

employer plans. Section 306(a) of the Amendments imposes a duty on every employer to make contractually prescribed payments "to the extent not inconsistent with law." In our view, this provision, construed in light of its legislative history, requires that *all* prescribed payments must be made so long as the making of the payment—in and of itself—is not unlawful.

A central concern of Congress in enacting the 1980 Amendments was to maintain the economic soundness of employee pension and welfare funds. Congress noted, *inter alia*, that contribution delinquencies were a major problem for most multiemployer plans, that the costs of collection adversely affect the financial health of plans, and that nonpayment by some employers lowers the benefits for participant employees and raises the contribution rates of employers who do pay. In particular, Congress decried the unnecessary complexity and costliness of what should have been simple collection actions. Indeed, the only provision the legislators mentioned as a possible defense to an action by fund trustees for delinquent contributions is 29 U.S.C. (& Supp. III) 186, a provision that renders the making of a payment by an employer to a representative of its employees in and of itself unlawful. This history strongly indicates that the only illegality defenses Section 306(a) would permit are those that are based on illegality in the very making of the payment itself.

Under this standard, neither of Kaiser's proffered defenses could be raised, because both are based not on any illegality in the making of the payment itself, but rather solely on the collective bargaining agreement context out of which the payments arise. Moreover, Congress expressed specific approval of a pre-amendment decision holding precisely the same statutory defenses unavailable as defenses to a suit for delinquent contributions.

B. The 1980 Amendments, which became effective upon their enactment nine days after the decision of the court below, are fully applicable to this case. In *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974), this

Court held that an appellate court is bound to "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Neither the language nor the legislative history of Section 306(a) suggests that the provision was not intended to apply to future cases. Nor would the application of Section 306(a) in this case result in "injustice," "manifest" or otherwise. The issue presented here is unquestionably one of "great national concern" (*Bradley, supra*, 416 U.S. at 719, quoting *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). In such cases, the rule of law in effect at the time of the decision on review is to be applied even at the expense of "the vested rights of * * * citizens" (*The Schooner Peggy, supra*, 5 U.S. (1 Cranch) at 110). In any event, there is no vested right to raise an illegality defense. This Court has noted (*Kelly* v. *Kosuga*, 358 U.S. 516, 519 (1959), quoting *McMullen* v. *Hoffman*, 174 U.S. 639, 669 (1899)) that an illegality defense "is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions." A party who signs a contract with an intent to plead its illegality after receiving its benefits thus does so at the risk that the legislative perception of the public interest might change. Finally, the application of Section 306(a) to this case imposes no unforeseeable liability on Kaiser, since Kaiser all along has known that it is a party to a contract that expressly imposes on it the very obligations that it is now attempting to avoid.

II

Section 306(b) unequivocally provides for the award of attorneys' fees to fiduciaries who prevail in an action brought under the 1980 Amendments. There is no suggestion in the statute's language or its legislative history that it was not meant to apply to cases that were pending on the date of its enactment. Moreover, because at-

torneys' fees are awarded only to *prevailing* fiduciaries, the question is simply one of allocating the costs of litigation between an employer and the corpus of a pension and welfare trust fund for its employees and their beneficiaries, from which the employer has been found to have wrongfully withheld agreed-upon contributions. Accordingly, no "manifest injustice" would result from the application of Section 306(b).

ARGUMENT

I. APPLICABLE LAW PRECLUDES KAISER FROM RAISING THE DEFENSE OF ILLEGALITY UNDER THE ANTITRUST LAWS OR SECTION 8(e) OF THE NLRA IN THIS ACTION BY TRUSTEES OF PENSION AND WELFARE FUNDS

As is shown by the decisions below, prior to the enactment of the 1980 Amendments, the question whether, in an action for delinquent contributions by trustees of a multi-employer plan, an employer could raise as a defense the alleged illegality of the agreement or plan calling for the contributions was controlled largely by the same legal rules that governed the availability of the defense of contract illegality in any type of suit: Resolution of the issue required a determination whether the case fit within the exception recognized in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959).[6] In general terms, an employer would be permitted to raise an illegality defense only if it could place itself outside the general policy " 'of preventing people from getting other people's property for nothing when they purport to be buying it' " (358 U.S. at 520-521, quot-

[6] While the courts below disallowed Kaiser's antitrust illegality defense on the basis of *Kelly* v. *Kosuga*, they based their refusal to adjudicate the alleged Section 8(e) violation on what they found to be exclusive NLRB jurisdiction of such matters. *Kelly's* analysis of the availability *vel non* of illegality defenses, however, would appear to apply not only to antitrust violations, but to violations of other laws as well, including the labor laws.

ing *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227, 271 (1909) (~~1909~~) (Holmes, J., dissenting)), and within the narrow exception for cases "where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act * * *" (358 U.S. at 520).[7]

---

[7] See also *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 756 (1947) (footnote omitted) ("[i]f, in order to prove his own case, a plaintiff proves his violation of law, then no court will aid the plaintiff to recover"); *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 252 (1925) ("[i]t is only where the invalidity is inherent in the contract that the [Anti-Trust] Act may be interposed as a defense"); *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U.S. 165, 172 (1915) ("whether the contract of sale was inherently illegal so as to bring it within the * * * elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrong-doing"); *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, *supra*, 212 U.S. at 261 ("[i]f judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination"); *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 547 (1902) ("[t]he plaintiff's cause of action is in no legal sense dependent upon, or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy"); *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899) ("no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract").

This is not to suggest, however, that in cases decided prior to the 1980 Amendments courts were not influenced by the unique and sympathetic posture of trustees of pension and welfare funds or that such considerations could not be, or were not, taken into account by courts in making the less than precise determination called for by *Kelly*. See *Huge* v. *Long's Hauling Co.*, 590 F.2d 457, 459 (3d Cir. 1978), cert. denied, 442 U.S. 918 (1979); *id.* at 462-466 (Adams, J., concurring); cf. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); and discussion at pages 25-28 and notes 18-19, *infra*.

In Section 306(a) of the 1980 Amendment, 94 Stat. 1295, however, Congress established a special rule governing the availability of illegality defenses in actions for delinquent contributions brought by trustees of multiemployer plans. We submit that, in doing so, Congress intended Section 306(a) to preclude a defendant-employer, in a suit by trustees for delinquent contributions, from raising the types of defenses that Kaiser has attempted to raise in this case.[8]

A. Section 306(a) of the 1980 Amendments Precludes the Raising of Kaiser's Illegality Defenses

1. *Section 306(a) makes an employer liable for all prescribed contributions except those the very making of which would itself be unlawful*

a. *The Statutory Language.* Section 306(a) of the 1980 Amendments, 94 Stat. 1295, provides (emphasis added):

> Delinquent Contributions
>
> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, *to the extent not inconsistent with law*, make such contributions in accordance with the terms and conditions of such plan or such agreement.

In view of the previous case law's various formulations of the illegality defense (see note 7, *supra*), it might be suggested that the statute releases employers from ERISA liability whenever the making of the required contribution would "*bring about* 'the precise conduct' [condemned] by * * * law" (Pet. Br. 9; emphasis added) or "permit a party to *reap the fruits* of illegal contract provisions * * *" (Pet. Br. 10; emphasis added). Neither

---

[8] To the extent that any other implication might otherwise arise from the "unenforceable and void" language of Section 8(e), the more recent legislation must, of course, prevail.

of these constructions is readily suggested by the statutory language, however. The statute contains no exemption for payments that cause or result in a state of affairs that is "inconsistent with law;" nor does it refer to payments that reward past illegal conduct. Rather, the phrase "not inconsistent with law" appears to modify the verb phrase "shall * * * make such contributions," suggesting that only when the very act of making the payment itself is unlawful will an employer's failure to make agreed-upon contributions be exempt from ERISA liability. Accordingly, we submit that the most reasonable construction of this statutory language is that an employer will be subject to liability under ERISA for *any* failure to make contributions called for by a collective bargaining agreement or trust agreement establishing a multiemployer plan unless *the very making of the payment itself* is unlawful, such as payments made in violation of 29 U.S.C. (& Supp. III) 186 (see discussion at page 23 & note 15, *infra*).

b. *The Legislative History.* The relevant legislative history also supports this construction of the statute.

(1) Congress enacted ERISA, 29 U.S.C. 1001 *et seq.*, in September 1974, for the purpose of protecting employees and other beneficiaries of private pension and welfare plans. To that end, ERISA establishes minimum standards of plan administration, vesting of plan benefits and fiscal responsibility, and provides for the insurance of vested plan benefits against the risk of premature plan termination. See H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 1-2 (1973). The statute requires that benefit plans be fully funded over a period of years (29 U.S.C. 1081-1086), and prohibits the trustees, who are to administer the funds in the interests of the beneficiaries with "care, skill, prudence, and diligence" (29 U.S.C. 1104(a)(1)(B)), from extending credit to participating employers (29 U.S.C. 1106(a)(1)(B)). The Departments of Labor and the Treasury, which administer ERISA, have construed these provisions as requiring the trustees to make "rea-

sonable, diligent and systematic" efforts to collect delinquent contributions, including, when necessary, "the institution of various forms of appropriate legal action." *Prohibited Transaction Exemption 76-1*, 41 Fed. Reg. 12740, 12741 (1976); accord, Department of Labor Advisory Opinion 78-28A (Dec. 5, 1978), *reprinted in* Pens. Rep. (BNA) No. 221 at R-25 (Jan. 8, 1979). See *Huge* v. *Old Home Manor, Inc.*, 419 F. Supp. 1019, 1020-1021 (W.D. Pa. 1976); cf. *Nedd* v. *United Mine Workers*, 556 F.2d 190, 210-212 (3d Cir. 1977), cert. denied, 434 U.S. 1013 (1978).[9]

Shortly after ERISA's enactment, it became apparent that application of the statute to multiemployer plans

---

[9] *Prohibited Transaction Exemption 76-1, supra*, 41 Fed. Reg. 12741 (1976), provides:

> [G]enerally neither the failure of a participating employer in a multiple employer plan to make a contribution to the plan when the contribution is due nor the failure of the plan to collect such a delinquent contribution constitutes a prohibited transaction under section[s] 406 and 407(a) of the Act, [94 Stat. 1303,] and section 4975(c)(1) of the [Internal Revenue] Code [(26 U.S.C.)]. However, if the plan is not making systematic, reasonable and diligent efforts to collect delinquent contributions, or the failure to collect is the result of an arrangement, agreement or understanding, express or implied, between the plan and the delinquent employer, such failure to collect a delinquent employer contribution may be deemed to be a prohibited transaction.

Because, under the vesting provisions of ERISA, 29 U.S.C. 1053, an employee who puts in a period of covered service receives credit toward his benefits even if his employer fails to make contributions, the trustees' failure to make "reasonable, diligent and systematic" collection efforts could result in a failure to comply with the statutory funding requirements. Advisory Opinion 78-28A, *supra*. For any reason other than an employer's inability to pay, the trustees' obligation to collect can be relieved only by a written agreement between the employer and the sponsoring union. *Prohibited Transaction Exemption 76-1, supra*, 41 Fed. Reg. 12742 (1976); see 29 U.S.C. 1186(c)(5)(B); *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437, 441-444 (3d Cir. 1967), cert. denied, 390 U.S. 947 (1968).

Supp III

presented difficulties in recovering delinquent contributions from employers. See, *e.g.*, *Prohibited Transaction Exemption 76-1, supra*, 41 Fed. Reg. 12741-12742 (1976). Theodore Groom testified on behalf of the Western Conference of Teamsters Pension Trust Fund (*Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 391 (1977)) that

> [t]he most significant, and the oldest, day-to-day problem faced by multiemployer plans is the timely collection of contributions owed the plan by employers under the bargaining agreements they have negotiated with local unions. The issue of employer delinquencies is an important one for the simple reason that employer contributions are the lifeblood of the fund.

He particularly noted (*id.* at 391-393) that no effective federal remedy was available for use by the trustees against delinquent employers,[10] that the trust funds incurred substantial administrative and legal expenses in collecting delinquent accounts, that some courts refused to enforce contractual provisions for attorneys' fees and liquidated damages and that, if a delinquent employer became insolvent, the trust funds enjoyed no priority in bankruptcy proceedings.[11] Groom recommended, *inter*

---

[10] At the time Groom testified, there was only one published decision upholding federal jurisdiction pursuant to Section 502 of ERISA, 29 U.S.C. 1132, in an action by trustees of a multiemployer plan for contributions due under a collective bargaining agreement (*Huge* v. *Old Home Manor, Inc., supra*), and its theory was unclear.

[11] Accord: *Multiemployer Pension Plan Amendments Act of 1979: Hearings on S. 1076 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 523 (1979); *The Multiemployer Pension Plan Amendments Act of 1979: Hearing on H.R. 3904 Before the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 193 (1980); *Multiemployer Pension Plan Termination Insurance Program: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 121-122 (1979); *The Multiemployer Pension Plan*

alia, "[a]mending the enforcement provisions of ERISA to declare that provisions in plan documents requiring the payment of liquidated damages * * * and reasonable attorneys' fees with respect to delinquent contributions under collective bargaining agreements shall be enforceable without regard to other state or federal law" (*id.* at 394).[12]

(2) While previous discussions concerning the problem of delinquent employer contributions and the concomitant cost of litigation by fund trustees had not focused specifically on the defenses that could be raised by employer defendants,[13] by 1980 intervening litigation

---

Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 96th Cong., 1st Sess. 772, 808 (1979).

[12] In a subsequent statement, Groom pointed out that employers sometimes used payment delays as the equivalent of low or no cost loans, and recommended a statutory provision requiring enforcement of reasonable liquidated damages clauses as an incentive for prompt payment. *ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 592-593 (1979).

[13] But see testimony of Groom, *supra*, to the effect that payment of liquidated damages and attorneys fees should be required "without regard to other state or federal law."

The operative language of Section 306(a) and (b) of the 1980 Amendments first appeared in Sections 262 and 271 of S. 3017, 95th Cong., 2d Sess. (1978). Sections 262 and 271 of S. 3017 were carried over in the next Congress in Sections 154 and 153 of S. 209, 96th Cong., 1st Sess. (1979). None of the commentary on these earlier bills suggests that the legislators considered whether the provision would do anything beyond requiring employers to make agreed-upon contributions "in accordance with applicable law." *ERISA Improvements Act of 1978: Joint Hearings on S. 3017 Before the Subcomm. on Labor of the Senate Comm. on Human Resources and the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance*, 95th Cong., 2d Sess. 123, 183, 364, 419, 1452-1453 (1978); *ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 106, 200, 589-594, 624-625 (1979).

had sharply defined the dimensions of that issue.[14] Hence, the sponsors of S. 1076, 96th Cong., 1st Sess. (1979), and H.R. 3904, 96th Cong., 1st Sess. (1979), which became the Multiemployer Pension Plan Amendments Act of 1980, addressed the question directly.

When introduced in Congress during the spring of 1979, neither H.R. 3904, *supra*, nor its Senate companion bill, S. 1076, *supra*, contained any provision concerning delinquent employer contributions. The first Senate committee to consider S. 1076, the Senate Committee on Labor and Human Resources, amended it to include, *inter alia*, a Section 308, entitled "Delinquent Contributors," which contained substantially the same language (see App. A, *infra*, 2a-3a) eventually enacted as Section 306 of the 1980 Amendments. Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration*, 242-243 (Comm. Print 1980) (hereinafter "*Comm. Print*").

After noting (*Comm. Print* 43-44) that employer contribution delinquencies were "a serious problem for most multiemployer plans," that the costs of collection "adversely affect the financial health of plans," and that nonpayment by some employers lowers the benefits for participants and raises the contribution rates for employers who do pay, the Committee described the thrust of its amendment concerning delinquent contributions as being to simplify and expedite the collection process by removing from it considerations extraneous to the ques-

---

[14] See *Waggoner* v. *McGray*, 607 F.2d 1229 (9th Cir. 1979); *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), cert. denied, 442 U.S. 918 (1979); *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F. Supp. 816 (D.D.C. 1980); *Western Washington Laborers-Employers Trust Fund* v. *McDowell*, 103 L.R.R.M. 2219 (W.D. Wash. 1979). The district court decision in this case was entered on March 9, 1979. 466 F. Supp. 911 (D.D.C.).

tion whether the employer had made a promise to pay (*id.* at 44; emphasis added):

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. *Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions.* This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.
>
> The public policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made *to discourage delinquencies and simplify delinquency collection.*

This theme was reiterated and clarified in statements made in their respective chambers by Representative Thompson, Chairman of the House Education and Labor Committee, and Senator Williams, Chairman of the Senate Committee on Labor and Human Resources—the floor managers of H.R. 3904, *supra.* During floor consideration of H.R. 3904 in the House, Representative Thompson explained (126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980); emphasis added):

> Because delinquencies of employers in making required contributions are also a serious problem for many multiemployer plans, we wish to make clear the public policy in this area, which this bill is intended to further. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time.

> Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys' fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability for all employers.
>
> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, *and without regard to issues which might arise under labor-management relations law—other than 29 U.S.C. 186.* Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.

Accord, 126 Cong. Rec. S11673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams) (emphasis added) ("[f]ederal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and *without regard to issues which might arise under labor-management relations law (other than 29 U.S.C. 186)*). See also 126 Cong. Rec. S10102 (daily ed. July 29, 1980) (remarks of Sen. Williams).

This legislative history strongly supports the construction of the statute suggested at pages 15-16 above—that

an employer will be liable for *all* contributions called for by a multiemployer plan or collective bargaining agreement except those *the very making of which* itself is unlawful. The committee that added the delinquent contributions provision to the 1980 Amendments and the floor sponsors of the legislation made clear that Congress's intent was to streamline the collection process by eliminating from it considerations "unrelated to" or "extraneous to" the employer's promise to pay and the plan's entitlement to the contributions; the Act's sponsors defined the only relevant considerations as those raised by 29 U.S.C. (& Supp. III) 186. The identifying feature of Section 186, however, is that it declares unlawful the very making of a payment itself—*i.e.*, the simple passage of money from the employer to any of the prohibited payees listed in 29 U.S.C. (& Supp. III) 186.[15] The statements made by the floor managers of the amendments thus demonstrate a clear legislative intent that the only type of contributions that would be exempt from liability under ERISA by Section 306(a) would be payments the very making of which itself is unlawful—payments such as those that are prohibited by 29 U.S.C. (& Supp. III) 186.

Permitting employers to raise illegality defenses based on 29 U.S.C. (& Supp. III) 186 makes sense with respect to both fairness to the parties and judicial administration.

---

[15] Section 186 makes unlawful *the very payment, loan or delivery* of "money or other thing of value" by any employer or association of employers to any representative of any of its employees, to any labor organization that represents or seeks to represent any of its employees, to any employee or group or committee of employees in excess of their normal compensation for the purpose of causing them to influence any other employees in the exercise of their right to organize and bargain collectively through representatives of their own choosing, or to any officer or employee of a labor organization with the intent to influence his or her actions, decisions or duties as a representative of employees or as an officer or employee of a labor organization, except for, *inter alia*, payments made to trust funds like those involved in the present case.

Section 186(c)(5) sets out the rules governing the administration of employee pension and welfare trust funds.[16] Hence, no defense could be less "unrelated" or "extraneous" to an employer's promise to pay or a plan's entitlement to contributions. Moreover, because the trustees bear the responsibility of administering the funds and have the most first-hand knowledge concerning that administration, they are appropriate parties against whom a Section 186(c)(5) illegality defense should be directed. Cf. *Huge* v. *Long's Hauling Co.*, 590 F.2d 457, 465 (3d Cir. 1978) (Adams, J., concurring), cert. denied, 442 U.S. 918 (1979).[17]

(3) By its respective endorsement and rejection of two pre-1980 Amendments lines of case law, Congress also made explicit the policy considerations that it viewed as requiring such a stringent construction of the statute (126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (re-

---

[16] Subsection (c)(5) requires (A) that the employer's payments be held in trust for the purpose of making medical, pension, compensation or insurance payments for the benefit of employees and their families and dependents; (B) that the detailed basis on which such payments are to be made be specified in a written agreement with the employer and that the employers and employees be equally represented in the administration of the fund; and (C) that such payments as are intended to be used for providing pensions or annuities be paid to a separate trust.

[17] One court of appeals has held, however, that not *every* violation of 29 U.S.C. (& Supp. III) 186 will be an adequate defense to an ERISA claim for delinquent contributions. In *National Stabilization Agreement of the Sheet Metal Industry Trust Fund* v. *Commercial Roofing & Sheet Metal*, Nos. 78-1761, 78-2071 (D.C. Cir. May 4, 1981), the court held that an employer's claim that a joint labor-management trust fund violated the "equal representation" requirement of 29 U.S.C. (Supp. III) 186(c)(5)(B) was not an adequate defense to a collection suit under Section 502 of ERISA, 29 U.S.C. 1132, for delinquent contributions because, "[u]nlike other defects [under 29 U.S.C. 186] such as the absence of a written agreement, or the absence of a detailed basis for employer payments, an equal representation defect does not practically preclude continued employer contributions" (slip op. 19 (footnote omitted)).

marks of Rep. Thompson); accord, *id.* at S11673 (remarks of Sen. Williams):

> [W]e endorse judicial decisions such as *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge* v. *Long Hauling Company, Inc.*, 590 F.2d 457 (3d Cir. 1978) [, cert. denied, 442 U.S. 918 (1979)]. Cases such as *Western Washington Laborers-Employers Health and Security Trust Fund* v. *McDowell* * * *, 103 LRRM 2219 (W.D. Wash., 1979) and *Washington Area Carpenters Welfare Fund, et al.* v. *Overhead Door Company*, [488 F. Supp. 816 (D.D.C. 1980)], are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

In *Lewis* v. *Benedict Coal Corp.*, *supra*, which construed a prior UMW pension and welfare trust fund, this Court emphasized the strong public policy in favor of maintaining the integrity of multiemployer pension and welfare trust funds (361 U.S. at 468-469):

> It is a commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death. While employers in many other industries assume this burden directly, this welfare fund was jointly created by the coal industry and the union for that purpose. * * *
>
> Moreover, unlike the usual third-party beneficiary contract, this is an industry-wide agreement involving many promisors. If [the employer] and other coal operators having damage claims against the union for its breaches may curtail royalty payments, the burden will fall in the first instance upon the employees and their families across the country.

In *Huge* v. *Long's Hauling Co.*, *supra*, which involved the same statutory defenses as the present case, Chief Judge Seitz, who announced the judgment of the

court, noted the special status that this Court and the lower courts have accorded the trustees of employee welfare and pension funds (590 F.2d at 459):

> [C]ourts have been extremely reluctant to recognize any defense to an employer's promise to pay into a pension fund. The trustees of the fund, although technically third-party beneficiaries, often can avoid contractual defenses that could be asserted against the union itself. *See Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 * * * (1960).[18]

Judge Adams concurred in the judgment in *Long's Hauling* on the ground that in an action by trustees of a multiemployer welfare or pension fund to compel an employer to make contributions prescribed in a collective bargaining agreement the employer may not assert *any* defenses it may have to that contract.[19] He also noted

---

[18] Accord, *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552, 557 (6th Cir. 1962) ("[*Lewis* v. *Benedict Coal Corp., supra,*] has now placed collective bargaining contracts in a special class, exempt from some of the rules of construction traditionally applicable to contracts").

[19] In his opinion announcing the judgment of the court, Chief Judge Seitz prohibited an employer from defending against an action brought by trustees of the UMW Health and Retirement Funds for contributions required by a collective bargaining agreement on the ground that Article II of the agreement, which provided (590 F.2d at 458) that "'[t]he transportation of coal * * * may be contracted out only to a contractor employing members of the UMWA under this Agreement,'" violated the Sherman Act and Section 8(e) of the NLRA. As discussed in the text above, Judge Adams concurred in the judgment. Judge Rosenn dissented on the narrow ground (590 F.2d at 466-467) that, in a suit by trustees of a multiemployer pension fund, an employer that is already under an obligation to contribute, and that does contribute, to a private pension fund for its employees may raise defenses that it has no duty *also* to pay the trustees on behalf of those same employees. In such circumstances, Judge Rosenn explained (590 F.2d at 469), "[e]mployees are not likely to suffer privation from the successful interposition of the defense * * * since the employer will have contributed to a private fund, as negotiated by the union, to which the employees have given their approval in a valid contract."

the courts' solicitude for such funds, and suggested some of the reasons for it (590 F.2d at 464-465; footnotes omitted):

> The wisdom of not permitting employers such as Long to interpose defenses to their undertaking to support union welfare and pension funds seems apparent. With both the number of Americans in retirement and the duration of those non-remunerated years of their lives increasing, and with the cost of health care soaring, it has become ever more important to provide for those situations where the cost of living will no longer be satisfied from anticipated income. Social security benefits are often insufficient by themselves to meet those needs, and must be supplemented from other sources. For millions of unionized employees, the chosen and preferred method for insuring against the privations of sickness, unemployment, and old age has been the union welfare and pension funds. Under such arrangements, the employer contributes periodically to the funds an amount negotiated by contract. Such contributions are, in reality, indirect or deferred compensation, earned by the employee with each hour or each day worked. Ensuring the viability of these funds and protecting the employees' investment from dissipation as a result of union or employer conduct or misconduct has for many years been a concern of the federal government, and has recently received renewed attention.
>
> As [*Lewis* v. *Benedict Coal Corp.*] makes clear, vital public interests are served by insulation of the employer's obligations to union welfare and pension funds form [*sic*] under the labor contract. It prevents penalizing employees for alleged union misdeeds over which they have little, if any, control. And it guarantees hard-working people the unemployment, health and retirement protections that they and their families expect to receive as part of the terms of their employment.

Judge Adams also noted (590 F.2d at 463 n.2) that "frequent litigation of such disputes would have a deleterious effect upon the pension funds, in that counsel fees

for the trustees would have to be paid from their accounts, and may affect the ability of the funds to provide the benefits they were designed to provide."

To be sure, none of those cases involved the enforcement of a contribution clause that itself was alleged to violate the law.[20] Nevertheless, the cases involved the same basic policy judgment present here. Moreover, both decisions that Congress disapproved (*Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F. Supp. 816 (D.D.C. 1980), and *Western Washington Laborers-Employers Trust Fund* v. *McDowell*, 103 L.R.R.M. 2219 (W.D. Wash. 1979)) had permitted as a defense the argument that, because the agreement calling for contributions was only a prehire agreement (see 29 U.S.C. 158(f)), which the employer could abrogate if the union had not acquired majority status, the employer's promise to contribute contained in it was unenforceable. Congress thus expressed its desire to preclude an employer from raising even an "illegality" defense that goes to the entire agreement containing the contribution clause.[21]

---

[20] In *Lewis* v. *Benedict Coal Corp.*, *supra*, 361 U.S. at 471, the Court held that an employer could not successfully defend against a charge that it had failed to make contributions required by a collective bargaining agreement on the ground that the union also had violated the agreement—by engaging in strikes and work stoppages—unless the parties to the agreement had expressed in "unequivocal words" their intent that "the union's breaches of its promises should give rise to a defense against the duty assumed by an employer to contribute to a welfare fund meeting the requirements of § 302(c)(5)." And in *Lewis* v. *Mill Ridge Coals, Inc.*, *supra*, the Sixth Circuit relied on *Benedict Coal Corp.*, *supra*, to hold that misconduct by the trustees themselves was no defense to an action by them for contributions required by a collective bargaining agreement. In *Huge* v. *Long's Hauling Co.*, *supra*, the provision of the collective bargaining agreement on which the employer attempted to base its defense of illegality was a different provision from that which called for the contributions at issue (see note 19, *supra*).

[21] While some appellate courts have held that the absence of majority status does not preclude enforcement of the fringe benefit

We submit, therefore, that our construction of Section 306(a), disallowing illegality defenses except when the very making of the payment itself is illegal, appears to be the balance that was struck by Congress, since that interpretation furthers the remedial purposes expressed by Congress to the fullest extent permitted by the statutory language and is wholly consistent with the legislative history. Indeed, the very policy question at the heart of this case—whether the statutory defenses Kaiser seeks to raise must yield to the congressional policy of curtailing interference with the collection of contractually prescribed contributions—was addressed by Congress in its endorsement (see pages 24-28 and note 19, *supra*) of the refusal in the *Long's Hauling* case to allow precisely the same statutory defenses to be raised. The fact that in that case those defenses related to a clause of the contract other than the one prescribing the payment obligation is immaterial to the expressed policy concerns that motivated Congress to adopt the Amendments.

2. *The making of the payments required by the purchase-of-coal clause is not, in and of itself, unlawful*

As we have shown above, the only type of illegality defense permitted by the 1980 Amendments is illegality in the very making of the payment itself. Kaiser has argued that "enforcement of the purchase-of-coal clause

---

provisions of a prehire agreement in a contract action by third party beneficiaries (*Contractors, Etc.* v. *Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981); *Western Washington Cement Masons Health & Security Trust Funds* v. *Hillis Homes, Inc.*, 107 L.R.R.M. 2897 (Wash. Ct. App. 1980)), Congress would preclude an employer even from raising the issue in defense to an action by fund trustees for delinquent contributions. (In *Contractors, Etc.*, the Eighth Circuit expressly noted (638 F.2d at 1130) that by holding as it did, it did not have to reach the question whether an employer may assert a union's lack of majority support as a defense to an action by a trust fund to recover unpaid contributions required by a prehire agreement.)

would have precisely the *effects* that both the antitrust laws and the labor laws are intended to prevent" (Br. 10, 15-18; emphasis added) and that it would aid the trustees in *realizing the fruits* of an allegedly unlawful agreement (Br. 18-22). Kaiser has never argued, however, that either the antitrust laws or Section 8(e) makes unlawful the payment, in and of itself, by Kaiser to the trustees.

Nor can Kaiser make that argument. If Kaiser were making a purely gratuitous payment to the trustees, neither the antitrust laws nor Section 8(e) would be involved. Rather, it is only the context in which the payments arise—the collective bargaining context—that gives Kaiser a basis for arguing that the payments are unlawful under the antitrust laws or Section 8(e). But that is not illegality in the making of the payment in and of itself.

As noted above (page 23 and note 15), 29 U.S.C. (& Supp. III) 186 is the only provision of which we are aware that makes payments from an employer to a representative of its employees *per se* unlawful. Kaiser, however, has never contended that the purchase-of-coal clause violates Section 186. Moreover, since the payments required by the purchase-of-coal clause are made for the benefit of Kaiser's own employees, the fact that the payments are computed by a standard other than those employees' work hours or Kaiser's output does not render them violative of 29 U.S.C. (Supp. III) 186(c)(5). See *Walsh* v. *Schlecht*, 429 U.S. 401 (1977).[22]

---

[22] We also disagree with Kaiser's characterization of the payments required by the present purchase-of-coal clause (which does not involve disparate payments; see note 3, *supra*) as solely a penalty imposed on Kaiser, rather than as an element of compensation to its employees, although we do not believe that distinction need be reached under the 1980 Amendments. In our view, the items of payment promised by an employer in a collective bargaining agreement cannot be so neatly compartmentalized. Rather, they make up part of a compensation "package," in ex-

B. Section 306(a) of the 1980 Amendments Is Applicable to This Case

Bradley v. *Richmond School Board*, 416 U.S. 696 (1974), involved the right of successful plaintiffs to recover attorneys' fees for services rendered prior to the effective date of a statute authorizing the payment of such fees. This Court held (*id.* at 711) that an appellate court is bound to "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." See also *Hutto* v. *Finney*, 437 U.S. 678, 694-695 n.23 (1978); *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 281-282 (1969); *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

Neither the language nor the legislative history of Section 306 contains any suggestion that it was not in-

---

change for which the union promises the services of its members. That this was the understanding of the parties in the present case is demonstrated by the collective bargaining agreement's provisions for negotiation of a substitute clause in the event the purchase-of-coal clause were held invalid (A. 32) and, indeed, for termination of the agreement in those circumstances (J.A. 56). To be sure, if Kaiser had made all its purchases from UMW producers and none from non-UMW producers, the funds would have received nothing under the purchase-of-coal clause, but would have received commensurately higher payments from the UMW producers, who already were obligated to contribute to the trust funds. The purchase-of-coal clause, therefore, simply assured that in either event similar contributions on the coal purchased by Kaiser, as well as that produced by Kaiser, would be made to the funds on behalf of Kaiser's employees. See generally 29 U.S.C. (Supp. III) 186(c)(5); *Walsh* v. *Schlecht*, *supra*.

Finally, Kaiser's argument (Br. 44-47) that disallowing the illegality defense raised in this case would, or at least might, "offend[] the constitutional requirement of the separation of powers" (Br. 44) has no application to the cause of action provided by Section 306(a) of the 1980 Amendments. As we have shown (pages 15-30), in defining that statutory right of action, Congress itself expressly limited the cause of action's vulnerability to illegality defenses.

tended to apply to pending cases. To the contrary, the fact that Section 108(c)(1) of the 1980 Amendments, 94 Stat. 1267, made Section 306 effective as of the date of its enactment indicates a congressional intent that Section 306 be applicable as soon as possible.

Nor would the application of Section 306(a) in this case result in "manifest injustice." See *Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 716-717; *Thorpe* v. *Housing Authority of Durham*, *supra*, 393 U.S. at 282; *The Schooner Peggy*, *supra*, 5 U.S. (1 Cranch) at 110. In *Bradley* the Court identified (416 U.S. at 717) three "concerns * * * relative to the possible working of an injustice[:] * * * (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." These concerns arise from the Court's admonition in *The Schooner Peggy*, *supra*, 5 U.S. (1 Cranch) at 110 (footnote omitted):

> [I]n mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.

1. *Nature and Identity of the Parties.* The plaintiffs in this case are the trustees of funds accumulated for the benefit of Kaiser's employees, former employees, and their dependents. None of the intended recipients is a direct party to the allegedly illegal contract. Rather,

they are third party beneficiaries of Kaiser's unqualified promise to make contributions to the funds. Moreover, the plaintiffs in this case and the employees and beneficiaries whom they represent are members of a class toward which both the courts and Congress have expressed special solicitude, and whom Congress specifically intended to protect in the 1980 Amendments. See 29 U.S.C. 1001 *et seq.* and *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), cert. denied, 442 U.S. 918 (1979), and the discussion of those cases at pages 25-28 above.

Hence, although the disputants in this case are private parties (as were the claimants in *The Schooner Peggy, supra*),[23] the issue presented here is unquestionably one of "great national concern" (*Bradley* v. *Richmond School Board, supra*, 416 U.S. at 719, quoting *The Schooner Peggy, supra*, 5 U.S. (1 Cranch) at 110). That national significance militates in favor of the applicability of the congressionally prescribed rule of law in effect at the time of the decision on review, even at the expense of "the vested rights of * * * citizens." *The Schooner Peggy, supra*, 5 U.S. (1 Cranch) at 110. In any event, as we show below, application of Section 306 (a) to the present case affects no vested right of Kaiser.

2. *The Nature of the Rights Affected.* In *Bradley*, the Court explained (416 U.S. at 720) that the second aspect of its concern that injustice might arise from retrospective application of a change in law relates to the *nature* of the rights that would be affected by the change: "The Court has refused to apply an intervening change to a pending action where it has con-

[23] Not only were the claimants of the schooner private parties, each of the officers on board the United States vessel at the time it seized the schooner had a private interest in a share of the prize money if the vessel ultimately were condemned (5 U.S. (1 Cranch) at 104).

cluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional."

The defense of illegality, however, does not assert a vested private right. As a party to an illegal contract seeking to avoid its obligation, Kaiser is acting in its capacity as co-conspirator, rather than victim. As this Court repeatedly has noted, the defense of illegality in such a situation "is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions." *Kelly* v. *Kosuga*, *supra*, 358 U.S. at 519, quoting *McMullen* v. *Hoffman*, 174 U.S. 639, 669 (1899). A party who signs a contract with an intent to plead its illegality after receiving its benefits thus does so at the risk that the legislative perception of the public interest might change. "No person has a vested right to be permitted to evade contracts which he has illegally made." *McNair* v. *Knott*, 302 U.S. 369, 373 (1937) (footnote omitted) (holding that Congress could, retroactively, render legal a contract illegal when entered into, thereby precluding the contracting party from obtaining judicial annulment of the contract); accord, *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 431 n.9 (1934); *West Side Belt R.R.* v. *Pittsburgh Construction Co.*, 219 U.S. 92, 104 (1911); *Gross* v. *United States Mortgage Co.*, 108 U.S. 477, 488-489 (1883); *Ewell* v. *Daggs*, 108 U.S. 143, 148-151 (1883). See also *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976).

3. *Nature of the Impact of the Change in Law.* Finally, the application of Section 306(a) to this case imposes no unforeseeable liability on Kaiser.[24] Kaiser

[24] The Court's "third concern has to do with the nature of the impact of the change in law upon existing rights, or, to state it another way, stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard" (*Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 720).

all along has known that it is a party to a contract that imposes on it the very obligations that it is now attempting to avoid. Moreover, when Kaiser became subject to the present purchase-of-coal clause in 1974, application to the coal producers of the previous purchase-of-coal clause, which required the payment of 40¢ per ton on produced coal and 80¢ per ton on purchased coal (see note 3, *supra*) had been upheld by the NLRB, *United Mine Workers of America* (*Dixie Mining Co.*), 188 N.L.R.B. 753 (1971), appeals dismissed on other grounds, 468 F.2d 1139 (D.C. Cir. 1972).[25] Accordingly, the possibility that Kaiser would be held liable on the present clause was hardly "new and unanticipated" (*Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 720).[26]

---

[25] The fact that a subsequent court decision invalidated the 80¢/40¢ "penalty" clause, *Riverton Coal Co.* v. *UMWA*, 453 F.2d 1035, 1040-1041 (6th Cir.), cert. denied, 407 U.S. 915 (1972), hardly detracted from the possibility that Kaiser would be held liable under the present purchase-of-coal clause, which imposes the same charge on purchased coal as on produced coal.

[26] Moreover, alternative remedies may be, or at least at one time were, available to Kaiser. First, Kaiser may be entitled to bring an antitrust action against the UMW for damages trebling the amount of its contributions to the funds under the purchase-of-coal clause. See *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 138-140 (1968). But see *Consolidated Express, Inc.* v. *New York Shipping Association*, 602 F.2d 494, 519-521 (3d Cir. 1979), vacated and remanded on other grounds, 448 U.S. 902 (1980) (recognizing a limited exemption to treble damage liability under the antitrust laws where the defendant can prove, *inter alia*, that at the time it entered into the challenged agreement it could not reasonably have foreseen that it would be held unlawful under 29 U.S.C. 158(b)(4) or (e) and, hence, not exempt from scrutiny under the antitrust laws).

An alternative remedy for the alleged Section 8(e) violation may not be available at this late date (except to the extent that a Section 8(e) violation may subject the provision to scrutiny under the antitrust laws; see *Connell Construction Co.* v. *Plumbers Local No. 100*, 421 U.S. 616 (1975)). However, Kaiser could have refused to sign the agreement at the outset, and 29 U.S.C. 187 would have afforded it a damage remedy against the Union if the

II. UNDER APPLICABLE LAW, THE TRUSTEES ARE ENTITLED TO ATTORNEYS' FEES

For the reasons stated in Part I(B) above, as well as those discussed below, we submit that the award of attorneys' fees to the trustees should be upheld under Section 306(b) of the 1980 Amendments, 94 Stat. 1295.

Section 306(b), 94 Stat. 1295, unequivocally provides for the award of attorneys' fees to a prevailing fiduciary in an action commenced subsequent to enactment of the 1980 Amendments. As is true of Section 306(a), previously discussed, neither the language of Section 306(b) nor its legislative history contains any suggestion that it was not meant to apply to cases that were pending on the date of its enactment.

Congress intended the attorneys' fees provision of Section 306(b) not as a punitive measure, but rather as a means of furthering the important national policy of protecting the financial soundness of employee benefit plans (see, *e.g.*, 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson); *id.* at S11673 (remarks of Sen. Williams)), a policy enunciated in the original ERISA enactment (see 29 U.S.C. 1001). Applying the amendment to pending cases would promote that

---

Union had struck to compel execution of the agreement and if the purchase-of-coal clause were found to be a "hot cargo" provision. Finally, Kaiser could have filed an unfair labor practice charge, subject, of course, to the NLRB General Counsel's determination of whether an unfair labor practice complaint should issue.

In any event, since, as we have shown, Kaiser has no vested right to raise the defense of illegality and its liability was foreseeable, it is difficult to see why precluding it from raising the illegality defenses, concerning its own contractual undertaking, would be "manifestly unjust."

Finally, we note that preclusion of the antitrust and Section 8(e) defenses in this context will not affect the prospective forms of relief that are available under those statutes. Indeed, a holding to the effect that employers may not raise such defenses in these circumstances would furnish an incentive to employers to litigate these issues directly—thereby vindicating the antitrust and labor law policies they serve—before significant liabilities accrue.

salutary policy. Nor would it create any injustice, "manifest" or otherwise. Because fees are awarded only to *prevailing* fiduciaries, the question is simply one of allocating the costs of that litigation between an employer and the corpus of a pension and welfare trust fund for its employees, former employees, and their beneficiaries, from which the employer has been found to have wrongfully withheld agreed-upon contributions. Accordingly, there is no less reason here than in *Bradley* v. *Richmond School Board*, *supra*, to apply the newly enunciated congressional policy concerning attorneys' fee awards, in furtherance of the important public interest Congress sought to advance.

CONCLUSION

The judgment of the court of appeals should be affirmed.[27]

Respectfully submitted.

REX E. LEE
Solicitor General
WILLIAM F. BAXTER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
BARBARA E. ETKIND
Assistant to the Solicitor General
ROBERT B. NICHOLSON
ROBERT J. WIGGERS
Attorneys

T. TIMOTHY RYAN, JR.
Solicitor of Labor
Department of Labor
WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
AUGUST 1981

---

[27] In our view, whether Kaiser could have raised an antitrust illegality defense or a Section 8(e) illegality defense under the law prevailing prior to the enactment of the 1980 Amendments is a closer question than whether it can do so at the present time. Because, for the reasons we have discussed, the 1980 Amendments are retrospectively applicable to all aspects of this case and require affirmance of the judgment, we submit that the Court need not reach that question or the question whether, under prior law, the trustees would have been entitled to attorneys' fees if they had prevailed.

APPENDIX A

Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1295 (the "1980 Amendments") adds a new Section 515 to ERISA, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 306(b) of the 1980 Amendments, 94 Stat. 1295, adds Section 502(g)(2) to ERISA, which provides:

> (2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
> (B) interest on the unpaid contributions,
> (C) an amount equal to the greater of—
> (i) interest on the unpaid contributions, or
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
> (E) such other legal or equitable relief as the court deems appropriate.

> For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or if none, the rate prescribed under Section 6621 of the Internal Revenue Code of 1954.

Section 108(c)(1) of the 1980 Amendments, 94 Stat. 1267, provides in relevant part that "the amendments to this Act made by the Multiemployer Pension Plan Amendments Act of 1980 shall take effect on the date of enactment of that Act."

A prior version of Section 306, which is discussed in the legislative history section of our brief (at pages 20-21), Section 308 of S. 1076, 96th Cong., 1st Sess. (1979) (*reprinted in* Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration* 242-243 (Comm. Print 1980)) provided:

> (a) Part 5 of subtitle (B) of title I is amended by adding after section 514 the following new section:
>
> "Sec. 515. Every employer who is obligated under the terms of a collectively bargained multiemployer plan (or under the terms of a collective bargaining agreement related to the plan) shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."
>
> (b) Section 502 is amended by—
>
> (1) redesignating subsection (b)(1) and (2) as subsection (b)(1)(A) and (B), and adding a new paragraph 2, to read as follows:
>
> "(2) The Secretary shall not initiate an action to enforce section 515.";

(2) redesignating subsection (g) as paragraph (1) of such subsection and inserting "(other than an action described in paragraph (2))" between "title" and "by" in such redesignated paragraph (1), and adding a new paragraph (2), to read as follows:

"(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan the unpaid contributions, interest on the unpaid contributions, and [an] additional amount equal to interest on the contributions as liquidated damages, a reasonable attorney's fee and costs of the action, to be paid by the defendant, as well as such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions is determined using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954, as amended."

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 353481 608